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78-1498

IN THE

Supreme Court of the United States

October Term, 1978

LEWIS DAVIS MICHEL

and

JOHN HANDY JONES,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Lewis Davis Michel and John Handy Jones, petitioners, pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this case on February 1, 1979.

OPINION BELOW

The final opinion of the United States Court of Appeals for the Fifth Circuit is reported at 588 F.2d 986, and is reproduced as Appendix A of this Petition.

JURISDICTION

The judgment of the Court of Appeals herein was entered on February 1, 1979. The petitioners' motion for rehearing, which was filed on February 13, 1979, was denied without written opinion on March 2, 1979. See Appendix B of this Petition.

This Petition was filed within thirty (30) days of the denial of the motion for rehearing.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the introduction into evidence of proof of other crimes (extraneous offenses) violated the petitioners' right to due process of law, as guaranteed by the Fifth Amendment.

2. Whether the petitioners' convictions were barred by the Double Jeopardy Clause of the Fifth Amendment.

3. Whether this Court should enforce the procedural requirements and/or substantive content of the Department of Justice's 'Petite policy'.

4. Whether the introduction of evidence against the petitioner Jones violated the Fourth Amendment prohibition against unreasonable searches and seizures.

5. Whether the prosecutor's final argument in which he asserted facts not adduced during the trial violated the Due Process Clause of the Fifth Amendment and/or the Confrontation Clause of the Sixth Amendment.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb; . . . nor be deprived of . . . liberty . . . without due process of law; . . .

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; . . .

STATEMENT OF THE CASE

Petitioners were convicted of conspiracy to import marijuana into the United States from the Republic of Mexico (Count 1) and of importing marijuana (Count 10 as to both petitioners; Counts 13 and 14 as to petitioner Jones).

Factual details of this case will be related only as they relate to the issues presented for review.

Proof of Other Crimes

The petitioners and others, headed up by Robert Belmares, engaged in a marijuana smuggling operation during 1975 and 1976. This group (who will collectively be referred to as the 'Dallas conspiracy') purchased high grade marijuana in Oaxaca, Mexico and transported it to the Dallas, Texas area by flying it from Mexico into Texas in small private aircraft. In May 1976 Belmares met Douglas Spitler, who was then working for individuals who were importing commercial (or low grade) marijuana from northern Mexico into New Mexico and west Texas. Although Belmares unsuccessfully attempted to recruit Spitler as a pilot for the Dallas conspiracy, Belmares did meet Spitler's employers, Wood and McVey, and from them learned of their conspiracy (referred to hereinafter as the 'New Mexico/west Texas conspiracy'). Wood elected to join Belmares and the Dallas conspiracy, but McVey declined to do so. At this juncture McVey and Wood terminated their relationship and ended the activities of the New Mexico/west Texas conspiracy. Thereafter, Wood and two of his New Mexico/west Texas conspiracy employees worked for Belmares and thus became a part of the Dallas conspiracy. However, after Wood joined the Dallas conspiracy, the operations of the New Mexico/west Texas conspiracy stopped. The sources of marijuana in Mexico for the commercial, low grade marijuana were never used by the Dallas conspiracy; the routes of importation and points of delivery in the United States used by the New Mexico/west Texas conspiracy were never used by the Dallas conspiracy; in short, the Dallas conspiracy continued its illicit activities just as before with the exception that Wood and his two former employees were not working for Belmares and were a part of the Dallas conspiracy.

During the trial of this case the prosecution was permitted to elicit, over the petitioners' objection, details of the importation activities of the New Mexico/west Texas conspiracy prior to May 1976. Petitioners contended at trial and on appeal that such evidence constituted proof of other crimes (extraneous-offense evidence), that it was therefore irrelevant, and that it was prejudicial because of the 'spill-over' effect it had.

Double Jeopardy/Petite Policy

As a result of their involvement in the Dallas conspiracy, both petitioners were charged in Texas state courts with marijuana-related offenses. Petitioner Michel was acquitted of bribery for the purpose of importing marijuana, whereas petitioner Jones was convicted of such offense. Both petitioners were convicted of possessing marijuana. The state offenses referred to all grew out of and were a part of the activities of the Dallas conspiracy, and the facts supporting the state charges were adduced during the trial of this case. The trial court denied motions to dismiss based on double jeopardy considerations.

During the trial of this case the prosecutor was questioned by defense counsel regarding the Petite policy and its application to this case. The prosecutor candidly admitted that he had not secured approval to prosecute petitioners from a superior in the Justice Department even though such approval was required pursuant to the Petite policy.

Search and Seizure

Petitioner Jones' conviction on Count 13 rests upon the seizure of marijuana by Dallas County sheriff's deputies in May 1976.

Sometime prior to the seizure in question, the manager of the Lancaster, Texas airport reported his suspicion to the Dallas County sheriff's office that the Lancaster airport was being used after hours as a landing strip for smuggling marijuana. This suspicion was founded upon the discovery of some marijuana in a small plane at the airport. Nothing eventful occurred after such discovery until the seizure in question. On May 21, 1976 the airport manager observed a U-Haul bob-tail truck parked near the airport runway, with its lights on, after the airport had closed. As a small plane began circling the runway the truck proceeded through a parking lot toward the runway. As the truck approached the runway the truck lights were turned off. The small plane landed and was met at the end of the runway farthest from the manager's vantage point where approximately three people off-loaded packages from the airplane into the truck. The truck then departed the airport across an open field in an easterly direction. These observations were reported by the manager to a sheriff's deputy who broadcast an order via police radio to stop a U-Haul bob-tail truck travelling eastbound in the vicinity of the Lancaster airport. Shortly after the broadcast, a U-Haul bobtail truck travelling in a *west-bound* direction was stopped by sheriff's deputies in the general vicinity of the airport. The driver and lone occupant of the truck, Michael Rush, was arrested for driving without a valid driver's license. The truck was seized by the deputies and transported to the Dallas County Sheriff's office where, after a warrant was secured setting out the aforementioned facts, it was searched. The truck contained 1,000 pounds of marijuana.

The marijuana seized from the truck and testimony relating to the stopping of the truck and all subsequent activities were admitted in evidence at the trial of this case.

The Improper Argument

The petitioners' conviction under Count 10 were supported solely by the testimony of William White, an immunized co-conspirator. The petitioners' convictions on the other counts also turned on White's testimony, although not exclusively as with regard to Count 10. Accordingly the credibility of White was of crucial importance in determining the guilt or innocence of the petitioners. During his direct testimony, White stated that he had flown with petitioner Michel to south Texas to aid petitioner Jones in one of the acts of importation. He specifically testified that he and Michel delivered a small private plane to Jones and that they (he and Michel) returned to Dallas via commercial airlines, to-wit: on Southwest Airlines. Michel's counsel argued to the jury that White was not worthy of belief; that the only portion of his testimony that could be corroborated by independent evidence was his testimony that he and Michel flew from south Texas to Dallas on a Southwest Airlines flight; and that the prosecution had not presented any evidence from Southwest Airlines records to corroborate White's testimony. Following this argument, during the prosecutor's final argument, the prosecutor advised the jury, over the petitioner's objection, that "Southwest Airlines destroys their tickets after six months and they are not available." The Court of Appeals did not respond to this issue, though raised in the briefs, in the court's opinion in this case.

REASONS FOR GRANTING THE WRIT

Proof of Other Crimes

Certiorari should be granted to enforce and apply the oft-repeated holding of this Court that the acts and declarations of co-conspirators are admissible against all conspi-

rators when such acts and declarations occur in furtherance of or during the life of the conspiracy to determine the admissibility of extraneous-offense evidence in a conspiracy case. The court of appeals has rejected application of this rule in this case, in contradiction to the holdings of other courts of appeals.

In *Krulewitch v. United States*, 336 U.S. 440 (1949), the Court discussed the admissiblity of a co-conspirator's statement made out of the accused's presence and after the offense had been completed. The statement was held inadmissible for the following expressed reasons:

> This hearsay declaration, attributed to a co-conspirator, was not made pursuant to and in furtherance of objectives of the conspiracy charged in the indictment, because if made, it was after those objectives either had failed or had been achieved. Under these circumstances, the hearsay declaration attributed to the alleged co-conspirator was not admissible on the theory that it was made in furtherance of the alleged criminal transportation undertaking.

Id., at 442-443. The Court in *Krulewitch* followed the strict rule announced in *Fiswick v. United States*, 329 U.S. 211 (1946), that "the act of one partner in crime is admissible against the others where it is in furtherance of the criminal undertaking". *Id*, at 217. See also *Wong Sun v. United States*, 371 U.S. 471, 490-91 (1963), and *Dutton v. Evans*, 400 U.S. 74 (1970), where the Court said, "It is settled that in federal conspiracy trials the hearsay exception that allows evidence of an out-of-court statement of one conspirator to be admitted against his fellow conspirators applies *only if the statement was made in the course of and in furtherance of the conspiracy* . . ." 400 U.S. at 81.

Although petitioners based their attack on the admissibility of the extraneous-offense evidence upon the cases cited above,[1] the court of appeals ignored petitioners' argument in disposing of the issue. The court began their analysis of the issue by considering the right of conspirators to a severance, which was not an issue raised by petitioners! The court went on to conclude that the extraneous-offense evidence was admissible under the rule that "[w]hen one knowingly joins a conspiracy in progress he is responsible for acts of the conspiracy occurring before or after his association with it." 588 F.2d at 1002. While the court's statement of the law is undoubtedly true, it is subservient to the rule announced in *Fiswick* and *Krulewitch*. The actions of a conspirator which are not done in furtherance of the conspiracy cannot be charged to his fellow conspirators.

The court of appeals properly evaluated the factual situation when it said, "This alliance [between Wood and Belmares] is best viewed as a merger of two independent smuggling groups with identical illegal purposes." 588 F.2d 1002. The court of appeals erred in deducting from such 'alliance' that the acts of each group prior to such 'merger' were done in furtherance of the conspiracy which resulted from the 'merger'. The evidence negates any notion that Wood's actions prior to joining forces with Belmares were done in furtherance of or contributed anything to the Dallas conspiracy. Both groups were operating independently of the other prior to the merger, and without knowledge of the other's existence. When Wood and Belmares joined forces, Wood disbanded his organization and his conspiracy effectively ceased operations. Thus, although it is highly arguable that Wood is chargeable with the acts of Belmares' group prior to the merger inas-

[1] See *Appellant's Brief* 5 - 7, filed in this case in the court of appeals by petitioners.

much as it is the Dallas conspiracy that survived the merger, it is factually impossible to conclude that any of the pre-merger activities of Wood contributed to and thus were done in furtherance of the Dallas conspiracy. The reasoning of the court of appeals in this case conflicts with the reasoning of the United States Court of Appeals for the Seventh Circuit in *United States v. Varelli*, 407 F.2d 735 (7th Cir. 1969), in that the merger of Wood and Belmares either resulted in a separate, new conspiracy or was a continuation of the existing Belmares'-Dallas conspiracy with new members; in no way did the merger represent a continuation of Wood's conspiracy so that his acts could be charged to members of the Dallas conspiracy. See also *Kotteakos v. United States*, 328 U.S. 750 (1946). The reasoning and holding of the court of appeals in this case also conflicts with the reasoning of the Court of Appeals for the Eighth Circuit in *United States v. Krol*, 518 F.2d 1134 (8th Cir. 1975), in that Spitler's testimony concerning events and acts that occurred prior to the Wood-Belmares merger were not admissible against petitioners in the absence of evidence that at the time of the events and acts which Spitler related Spitler was a member of, or was acting in furthernace of the conspiracy to which petitioners belonged.

For the foregoing reasons this Court should issue a writ of certiorari and resolve the disputes inherent in the opinion of the court of appeals in this case.

Double Jeopardy/Petite Policy

Certiorari should be granted in this case to resolve two issues which fall within the ambit of the Double Jeopardy Clause. First, whether adherence to the 'dual sovereignty' concept is tenable in light of *Benton v. Maryland*, 395 U.S. 784 (1969). Second, whether the *Petite* policy should be enforced as a corrollary of either the Double Jeopardy Clause or the Due Process Clause.

This Court has steadfastly adhered to the 'dual sovereignty' concept when faced with claims of double jeopardy that flow from convictions in federal or state courts after the accused had been tried for the same offense in, respectively, a state or federal court. The reasoning behind the 'dual sovereignty' concept is that every citizen of the United States owes allegiance to both the federal government and to the state government wherein he is located; thus, punishment by both governments for an offense against their laws, albeit the acts giving rise to the offense against the laws of each government are the same, is not barred by the Double Jeopardy Clause. *Bartkus v. Illinois*, 359 U.S. 121 (1959). Inextricably tied to this reasoning was the conclusion that the Double Jeopardy Clause did not apply to the states. *Id*, at 124-30.

In *Benton v. Maryland, supra*, this Court "recognize[d] the inevitable" and held the Double Jeopardy Clause applicable to the states in the same manner as it applied to the federal government. As a consequence of *Benton* and *Walker v. Florida*, 397 U.S. 387 (1970), citizens of the United States may expect the protection of the Double Jeopardy Clause to apply to state prosecutions just as the protection applies to federal prosecutions. But, so long as the 'dual sovereignty' concept remains a part of the law, citizens can expect the Double Jeopardy Clause to apply only in a horizontal fashion, that is, in state courts and in federal courts, but not in a vertical situation where prosecution occurs in both a state and a federal forum. Such a situation is an anomaly in that a citizen can expect to be free from duplicitous prosecution or punishment at the hand of the states in precisely the same manner as are his expectations when

he is prosecuted and/or punished by the federal government; but the very protections accorded him by the federal constitution when in state or federai hands evaporate when he is charged by both governments.

The decision in *Ashe v. Swenson*, 397 U.S. 436 (1970), portends the demise of the 'dual sovereignty' concept. In *Ashe* this Court incorporated into the protection afforded by the Double Jeopardy Clause the long-standing evidentiary doctrine of collateral estoppel, and made the doctrine applicable to the states. It is inconceivable that collateral estoppel does not apply vertically, that is, across the line separating state prosecution and federal prosecution. A citizen accused of a violation of both federal and state laws grounded upon the same facts is surely protected from prosecution by both 'sovereigns' where the elements of both offenses are identical and the accused is acquitted in one of the forums. No other reasonable conclusion is possible from the reasoning and logic of *Ashe*.

This Court should grant certiorari to consider whether the 'dual sovereignty' concept should be overruled, as it should since it is a fiction which cannot be reconciled with *Benton*, *Waller* and *Ashe*.

Certiorari should also be granted in this case to consider this Court's role vis-a-vis the Department of Justice's Petite policy. In *Rinaldi v. United States*, 434 U.S. 22 (1977), this Court gave recognition to the policy and enforced its application. The Court described the procedural requirements of the policy thusly:

> The Petite policy is most frequently applied against duplicating federal-state prosecutions. As stated by the Department of Justice, under that policy a federal trial following a state prosecution for the same act or acts is barred 'unless the reasons are compelling.' A United States Attorney contemplating a federal prosecution in these circumstances is required to obtain authorization from an appropriate Assistant Attorney General. In this case, the Justice Department official who instructed trial counsel to insist upon a retrial had not obtained the requisite approval.

Id, at 24, n.5.

> The prior-authorization requirement in the Petite policy ensures that the Department of Justice will normally make the 'compelling reasons' determination prior to commencement of the federal prosecution. On occasion, however, a prosecution is initiated and a conviction obtained in violation of the policy. When the Solicitor General has discovered such a violation in a case pending before this Court, he has sought to remedy it by moving to have the case remanded to allow the Government to dismiss the indictment.

Id, at 25, n. 8.

The Assistant United States Attorney who prosecuted this case candidly admitted that he had not sought nor secured prior authorization to prosecute the petitioners pursuant to the requirements of the Petite policy, although he knew of their state trials, acquittal and convictions. Hopefully, the Solicitor General, when he reads this Petition, will take the action described by the Court in *Rinaldi* at footnote 8 and move to have the case remanded. But in the event he does not, this Court must squarely face the responsibility of upholding the prior-authorization requirement of the Petite policy as a matter of due process. If, as in *Rinaldi*, this

Court is going to enforce the Petite policy when the Government acknowledges its failure to comply with the prior-authorization requirement of the policy, the same result is mandated where, as here, the record affirmatively establishes the Government's failure to comply with the same requirement.

If the Solicitor General moves to have this case remanded, and this Court grants the motion, the issues presented in this Petition will be mooted. However, if such a motion is not filed by the Solicitor General, certiorari should be granted to consider this Court's responsibility to enforce the Petite policy, as suggested by Mr. Justice Rehnquist in his dissenting opinion in *Rinaldi.*

The Search Issue

The court of appeals correctly noted that if the justification for the stop of the U-Haul truck is insufficient to render the stop lawful, the subsequent acts (including the seizure of the marijuana in the truck) were fruits of the poisonous tree. The court of appeals bottomed justification for the stop upon two theories: the right of a police officer to stop a vehicle and request production of a driver's license, and his right to stop a vehicle if he has reasonable grounds to suspect that the vehicle or its occupants are involved in criminal activity.

The first reason relied upon by the court of appeals – the right to stop vehicles to check for driver's licenses – is clearly an unconstitutional predicate for police invasion of a citizen's right to privacy guaranteed by the Fourth Amendment. *Delaware v. Prouse*, No. 77-1571, U.S.Sup.Ct., March 26, 1979.

The second reason relied upon by the court of appeals – reasonable grounds to suspect criminal activity – has no application to this case under the facts. Given the unusual nature of the events witnesses at the airport by its manager, nothing was seen to suggest criminal activity. Although several planes were under surveillance at the airport because of a suspicion that they might be involved in smuggling activities, the plane in question was not identified as being one of the planes under suspicion. More critically, though, is the lack of any connection between the U-Haul that was stopped by the sheriff's deputies and the activities at the airport. The airport manager reported that a U-Haul bobtail truck was seen at the airport under unusual circumstances. That truck was not identified more specifically so as to distinguish it from any other U-Haul bobtail truck. Additionally, the truck was last seen travelling in an easterly direction, and the 'pick up' or 'stop' order specified a U-Haul truck travelling east. The truck in question was stopped travelling *west* and was stopped at a distance from the airport which rendered it unlikely that it could have been the same truck which the airport manager reported to the deputies. The court of appeals took no note of these last two factors in their factual summary leading to their conclusion that "[t]hese facts, viewed as a whole, amounted to suspicion sufficient to warrant an investigative stop." 588 F.2d at 998.

The facts of this case parallel the facts in *Sibron v. New York*, 392 U.S. 40 (1962). In *Sibron* a police officer observed Sibron to converse with six or eight persons who he knew to be narcotics addicts. The officer followed Sibron to a restaurant where Sibron spoke with three other known addicts. Sibron sat down, ordered some pie and coffee, at which time the officer approached him and or-

dered him outside. Outside the restaurant the officer told Sibron, "You know what I am after", at which juncture Sibron reached into his pocket wherein the officer found heroin. In this case the airport manager was suspicious of the activity involving the truck and the plane because of other previous incidents which were not connected to the incident in question. He related his suspicious observations to the sheriff's department, and based on such information, coupled with the further suspicion that the airport had previously been used as a landing strip for marijuana smuggling, the stop of the truck was effected. The combined knowledge of the sheriff's deputies at the time of the stop of the truck was no greater than the arresting officer in *Sibron* insofar as there being articulable facts from which it could reasonably be concluded that the truck was involved in any criminal activity. This Court made it clear that merely because an automobile is involved in a challenged search and seizure, the requirements of the Fourth Amendment are not relaxed or suspended. *Coolidge v. New Hampshire*, 403 U.S. 443, 461 (1971). Absent some fact tending to connect the U-Haul truck in question with the activities at the Lancaster airport, there was no constitutionally adequate, reasonable grounds for stopping the truck. All that was demonstrated is that the airport manager had some suspicion that the unusual activities he witnessed at the airport involved marijuana smuggling, and that the deputies who stopped the truck had some suspicion that the truck was the same truck observed earlier at the airport. Two parts of suspicion, without more, is not constitutional justification for the invasion of a citizen's Fourth Amendment right to privacy and liberty.

Certiorari should be granted because the court of appeals failed to apply the Fourth Amendment standards established by this Court in resolving the search question in this case.

Improper Argument
(Confrontation)

Certiorari should be granted to consider the propriety of a prosecutor's jury argument consisting of assertions of facts which are not developed during the trial, and the application of the Confronation Clause to such conduct. It is especially important that this issue be considered in this case because, although raised in the petitioners' briefs filed in the court of appeals, the court of appeals failed to address the issue.[2]

As previously noted, William White, an immunized co-conspirator, gave the most damaging testimony against the petitioners. White's testimony formed the sole basis for the petitioners' convictions under Count 10; it was the substantial basis for the petitioner Michel's conviction under Count 1; and it was a substantial basis fo rthe petitioner Jones' other convictions. That White's credibility was crucial as to the jury's determination of the petitioners' guilt or innocence is borne out by the fact that White's testimony formed the exclusive basis for the charges in Counts 11 and 12, of which the petitioners were acquitted. With respect to White's testimony relating to Counts 1 and 10, the only portion of his testimony that was susceptible of corroboration by an independent source or by independent testimony was his assertion that he and Michel transported a small plane to south Texas and delivered it to Jones to further Jones' flight to Mexico to secure some marijuana. The independent corroboration available to the prosecution was in the form of tickets or a passenger manifest from the commercial airline – Southwest Airlines – which White testified he and Michel used to return from south Texas to Dallas. Petitioner's counsel, in his argument to the jury,

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[2] Appellant's Brief 11-14.

pointed out that this fact was the only part of White's testimony that the prosecution could have corroborated by unimpeachable independent evidence, but that the prosecution had not produced such evidence. Over petitioners' objections, the prosecutor advised the jury during his final argument that Southwest Airlines destroys their tickets after six months and that the independent evidence alluded to by defense counsel was therefore not available to the prosecution for introduction. No evidence adduced at the trial supported the prosecutor's assertion made in his argument.

The complained of argument was improper because it was not based on any facts established during the trial and it asserted as a fact a matter which was not shown to be true. It was prejudicial because the jury could reasonably conclude, in light of the trial court's ruling on the petitioners' objections to the argument, that his assertion was true and that White's testimony respecting the trip to South Texas was entitled to greater credibility than was the remainder of his testimony, a conclusion not too remote from what the jury's verdicts reflect.

The prosecutor's assertion of fact during his jury argument was not subject to cross-examination by the petitioners. The trial court, by his ruling on the petitioners' objections, effectively admitted the asserted facts as evidence in the case. This combination was an effective denial of the petitioners' right to confront the witnesses whose testimony serves as the basis for their convictions. *Pointer v. Texas*, 380 U.S. 400 (1965), and cases therein cited.

Virtually every court of appeals has condemned the type of improper jury argument used by the prosecutor in this case. *See*, e.g., *United States v. Leon*, 534 F.2d 667 (6th

Cir. 1975); *United States v. Bledsoe*, 531 F.2d 888 (8th Cir. 1976); *United States v. Diharce-Estrada*, 526 F.2d 637 (5th Cir. 1975); *United States v. Freeman*, 514 F.2d 1314 (D.C.Cir. 1975); *United States v. Martinez*, 514 F.2d 334 (9th Cir. 1975); *United States v. Fearns*, 501 F.2d 486 (7th Cir. 1974); *United States v. Perez*, 493 F.2d 1339 (10th Cir. 1974); *United States v. Gonzalez*, 488 F.2d 833 (2nd Cir. 1973); *United States v. Small*, 443 F.2d 497 (3rd Cir. 1971); *United States v. Gamberg*, 410 F.2d 383 (4th Cir. 1969); and *Kitchell v. United States*, 354 F.2d 715 (1st Cir. 1966). In order to implement what appears to be a unanimous attitude concerning improper jury argument and properly adjust the concomitant confrontation claim, this Court should grant certiorari in this case.

PRAYER

For the reasons stated herein the petitioners pray that this Court issue a writ of certiorari to review the judgment and opinion of the court of appeals in this case.

Respectfully submitted,

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By: _____
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CERTIFICATE OF SERVICE

I, Melvyn Carson Bruder, a member of the Bar of the Supreme Court of the United States and counsel for the petitioners in the aforegoing case, hereby certify that on this the 30th day of March, 1979, I served upon the Solicitor General of the United States one (1) copy of the aforegoing Petition for Writ of Certiorari by placing the same in the United States mail in Washington, D.C., addressed as follows: The Honorable Wade H. McCree, Jr., Solicitor General of the United States, Department of Justice, Washington, D.C., with sufficient prepaid postage affixed thereto,

MELVYN CARSON BRUDER

APPENDIX A

OPINION OF THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNITED STATES v. MICHEL

588 F.2d 986

A.1

UNITED STATES of America,
Plaintiff-Appellee,

v.

Lewis Davis MICHEL, Robert Joseph Belmares, John Handy Jones, Daniel Stewart Henshaw and Ted Ray Hines,
Defendants-Appellants.

No. 77-5518.

United States Court of Appeals,
Fifth Circuit

Feb. 1, 1979.

Appeals from the United States District Court for the Northern District of Texas.

Before GEWIN, RONEY and GEE, Circuit Judges.

GEE, Circuit Judge:

Facts

This case arose out of a two-year scheme to import large quantities of marijuana into the United States from the Republic of Mexico. The scheme, more notable for its spectacular failures than for its successes, was at last brought to a halt by various law enforcement agencies following the importation of two plane loads of marijuana into South Texas from Mexico. Count 1 of the 17-count indictment charged a conspiracy among 19 named defendants and others to acquire marijuana in the Republic of Mexico and to transport it to Dallas, Texas, and other areas of the United States in violation of 21 U.S.C. § 963.[1] In count 2, appellant Belmares was charged with the conduct of a continuing criminal enterprise in violation of 21 U.S.C. § 848.[2] Counts 4 and 5 charged Belmares and others with importation of

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[1] 21 U.S.C. § 963 provides:

> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

[2] 21 U.S.C. § 848 provides in part:

> (a)(1) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine of not more than $100,000, and to the forfeiture prescribed in paragraph (2)
>
> * * * * * *
>
> (b) For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if–
>
> (1) he violates any provision of this subchapter or subchapter II Of this chapter the punishment for which is a felony, and

marijuana in violation of 21 U.S.C. §§ 952(a)[3] and 960.[4] Counts 10, 11 and 12 charged appellants Michel, Belmares and others with importation offenses. Count 13 charged an importation offense against Belmares and Jones. In count 14, Jones and another defendant were charged with an additional act of importation.

> (2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter–
>
> (A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and
>
> (B) from which such person obtains substantial income or resources.

[3] 21 U.S.C. § 952(a) provides in part:

> It shall be unlawful . . . to import into the United States from any place outside thereof, any controlled substance in schedule I or II of subchapter I of this chapter, or any narcotic drug in schedule III, IV, or V of subchapter I of this chapter . . . .

[4] 21 U.S.C. § 960 provides in part:

> (a) Any person who–
>
> (1) contrary to section 952 . . . of this title, knowingly or intentionally imports or exports a controlled substance . . . shall be punished as provided in subsection (b) of this section.
>
> (b)(1) In the case of a violation under subsection (a) of this section with respect to a narcotic drug in schedule I or II, the person committing such violation shall be imprisoned not more than fifteen years, or fined not more than $25,000, or both. If a sentence under this paragraph provides for imprisonment; the sentence shall include a special parole term of not less than three years in addition to such term of imprisonment.
>
> (2) In the case of a violation under subsection (a) of this section with respect to a controlled substance other than a nar-

Appellant Michel was acquitted on counts 11 and 12 and was convicted on counts 1 (conspiracy) and 10 (importation). Belmares was acquitted on counts 11 and 12 and convicted on counts 1 (conspiracy), 2 (continuing criminal enterprise), 4, 5, 10 and 13 (importation). Appellant Jones was acquitted on counts 11 and 12 and convicted on count 1 (conspiracy) and counts 10, 13 and 14 (importation). Appellants Henshaw and Hines were convicted on count 1 (conspiracy).[5]

The evidence adduced by the government at trial established the existence of a loosely organized group of people who, during a period of approximately two years, participated in the importation of marijuana from the Republic of Mexico into the United States. Most of the testimony came from witnesses who were actual participants in the

cotic drug in schedule I or II, the person committing such violation shall be imprisoned not more than five years, or be fined nor more than $15,000, or both. If a sentence under this paragraph provides for imprisonment, the sentence shall, in addition to such term of imprisonment, include (A) a special parole term of not less than two years if such controlled substance is in schedule I, II, III, or (B) a special parole term of not less than one year if such controlled substance is in schedule IV.

[5] Appellant Michel was sentenced to concurrent terms of five years' imprisonment to be followed by a three-year special parole term. Belmares was sentenced to consecutive five-year terms of imprisonment on counts 1, 4 and 10, to be served concurrently with consecutive five-year terms on counts 5 and 13 and with a fifteen-year term on count 2. In addition, Belmares was assessed a three-year special parole term. Appellant Jones was sentenced to concurrent five-year terms of imprisonment on counts 10 and 13, and they were made consecutive to the concurrent five-year terms imposed on counts 1 and 14. He was also sentenced to serve three years of special parole. Henshaw received a sentence of five years' imprisonment and a three-year special parole term, and Hines was sentenced to two years' imprisonment and three years of special parole.

purchase, importation, and transportation of the marijuana and who were testifying pursuant to plea bargains or in exchange for immunity from prosecution. In order to provide an evidentiary foundation for our discussion of the claimed errors and to better identify the "cast of thousands,"[6] we shall set out the facts in some detail.

The central figure of the group was appellant Robert Belmares. In early 1975 Belmares, who had been engaged in smuggling marijuana from Mexico by backpack, sought to expand and modernize his operation and to increase his profits by flying the marijuana from Mexico into Texas. Belmares and his associate, Ronnie Dyer, joined forces with Robert Potter, who had a connection for the purchase of marijuana, and T. Michael Powell, who was a pilot for their combined venture. Also joining the group during this period was Allan Wilkes, who helped locate a landing site in Texas. In February of 1975, Powell, Belmares, and Potter flew to Mexico in a private airplane to familiarize themselves with the problems to be encountered in flying across the border. Potter characterized this trip as a "recognizance" mission.

In March of 1975, Potter began purchasing marijuana in Oaxaca, Mexico, using money furnished by himself and Belmares. The Mexican "connections," or sources of the marijuana, were Oscar Gracia de Anda and Geronimo Rodriguez. Potter handled the Mexican end of the venture, and Belmares was responsible for the return flight to the United States and for transportation of the load and distribution in the United States. Powell flew the load of marijuana from Oaxaca, but the venture ended in disaster when he landed

[6] The cast includes, among others, an electrical engineer, a graduate of the Yale Law School, a real estate salesman, a real estate developer, a combat decorated ex-Air Force captain, and a minister.

the plane on a beach in Tampico and damaged the landing gear, stranding the cargo. Belmares engaged Thomas Waldon to replace Powell as pilot and to pick up the beached marijuana, which was returned safely to the United States in April with the help of Belmares and a number of his associates.[7] Belmares and Potter then returned to Mexico with funds to begin a month-long series of marijuana purchases. This marijuana was flown by Waldon in May to Addison, Texas, where Wilkes had arranged for the flight to be met.[8]

Between late spring and summer 1975, the same group made additional flights with marijuana. During this time they paid a Mexican official named Luis Garza to provide protection at a landing site in northern Mexico. Belmares became less active in the physical acts of importation but continued to retain a financial interest in the ventures. Belmares and Wilkes had a disagreement concerning some marijuana which vanished in transit;[9] Potter dropped out, but the group continued to use the source introduced to them by Potter at the inception of the plan. Powell continued to fly for the enterprise, and Wilkes was a distribution agent in the United States.

By January 1976, additional people had become involved in Belmares' operation. Appellant John Handy Jones was a pilot for the group and referred to Belmares and Dyer as his partners. Appellant Lewis Davis Michel served as a go-

[7] This act of importation was the basis for count 4 of the indictment.

[8] This act of importation was the basis for count 5 of the indictment.

[9] The confederates were told that a dog had run off with a duffel bag of the marijuana. No one was totally convinced by this explanation of why the load was forty pounds light.

between for Jones and Belmares and performed various services on the ground, including meeting the flights when they landed in the United States. William C. White had been recruited as a pilot, and on one evening in early 1976 he received a call from Michel asking him to meet Jones at Love Field in Dallas. Michel explained that he had planned to meet Jones at their clandestine airstrip near Cleburne but that Jones passed over the landing site in the darkness and was proceeding to Love Field. White went to the airport as requested and met Jones, who announced that he had just flown in a load of marijuana from Mexico. White later watched as Jones and Michel loaded the marijuana into a van, and Michel drove it away.[10]

Powell continued to fly for the Belmares organization, but in April 1976, a load which Powell had been scheduled to transport from Mexico several weeks earlier was flown by Waldon instead. The marijuana had been purchased with the aid of Oscar Garcia de Anda and Geronimo Rodriguez, the group's Mexican sources. Waldon was forced by weather conditions to land at Temple, Texas, where he was met by Wilkes and another man. The marijuana was unloaded but was transported only as far as the gate of the airport, where all three men were arrested. In May of 1976, Powell was arrested in Mexico, and Belmares, in his attempt to recruit another pilot, was introduced to Douglas Spitler. At this time Spitler was an employee of Jim Wood and was engaged in a separate operation flying marijuana from Mexico into West Texas and New Mexico for Wood and his partner, McVey, using aircraft supplied by James Malone. Neither Belmares nor White was successful in recruiting Spitler to fly for their organization, but White recruited Robert Cross

[10] This act of importation was the basis for count 10 of the indictment.

to accompany Jones to Mexico, where a marijuana purchase was made and loaded on their airplane. Cross flew the load to Lancaster, Texas, and transferred it to a U-Haul truck, but this load was seized after delivery.[11]

In the meantime, Belmares succeeded in obtaining an introduction to Jim Wood. Each had something the other needed. Belmares had excellent connections for high-grade marijuana through Oscar Garcia de Anda and Oaxaca but needed money, planes and a pilot. Wood and McVey had all of these but lacked a source of high-grade marijuana. In late spring of 1976, Belmares and Wood agreed to join forces to their mutual benefit. McVey left the expanded operation at this point because he wished to avoid southern Mexico.

Meanwhile, John Handy Jones, in order to secure a protected landing site in the United States, had offered a bribe to the chief of police of Addison, Texas. In return for the money, Jones expected noninterference with landings at the Addison airport and tipoffs in the event of an impending drug bust. The Addison airport was used in May and June, 1976, for several trips in which Jones, Michel, and Wilkes were involved. In fact, however, the Addison police chief had only pretended to accept the offer and was cooperating with other law enforcement agents. In late June 1976, Michel, Jones, and others were arrested at the Addison airport following a flight from Mexico,[12] In July of 1976, Belmares, Mike Lallier and Wilkes arranged for a landing site and ground crew at Horsehoe Bay in Central Texas, and Belmares

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[11] This act of importation was the subject of count 13 of the indictment.

[12] The flight on this occasion was the basis for count 14 of the indictment.

then went to Mexico to buy marijuana. One load of marijuana was successfully flown to Horseshoe Bay from Tampico, with Wood assisting at the landing site, but later in the month two of Belmares' ground personnel were arrested at Horsehoe Bay with 200 pounds of marijuana. In September of 1976, Lallier flew a load of marijuana from Oaxaca to a landing strip in South Texas for refueling and on to Dallas, where Wood again helped transport the marijuana when the plane landed.

In October 1976, Spitler, under the direction of Wood and Malone, flew 1,300 pounds of marijuana from Oaxaca to the vicinity of Cotulla and Freer in South Texas. Appellant Henshaw showed Spitler the runway in Mexico, and Oscar Garcia de Anda was there when Spitler arrived. Wood met the loaded flight at its return destination in South Texas. At about this time the group recruited Dueal Ray Hulsey, who had become acquainted with Jones while he was in jail following his arrest at Addison in June. The two had discussed marijuana smuggling in their cell, and Hulsey had represented himself to be a pilot. Belmares, in October 1976, asked Hulsey to go to Mexico and to a location in Texas to look at a damaged plane to determine whether it could be safely flown. Upon arriving in Mexico, Hulsey was greeted by Henshaw and Oscar Garcia de Anda, but Hulsey refused to fly the damaged plane back to the United States. Although Hulsey was recruited as a pilot and represented himself to be one, he was not a licensed pilot and was in fact cooperating with law enforcement agencies during this period. In November 1976, Hulsey was sent by Jones to check a prospective landing site in the Cotulla-Freer vicinity. Belmares told Hulsey that he (Belmares) was in charge of the details and scheduling of the trips.

During this November 1976 time frame, two meetings were held at which a future importation trip was discussed. Spitler attended both meetings; at the first he met with Wood and Malone and was introduced to appellant Hines. Wood explained to Spitler that Hines owned a motor home and was considering driving marijuana for the group. At the second meeting, Spitler met with Wood, Belmares, Jones, Henshaw and others. Also in November 1976, Belmares and Lallier had purchased an airplane registered in the name "G. Oscar Andan," whose address was listed as 3710-A Cedar Springs in Dallas. The plane, an Aero Commander with the identification number N344V, was used in November and early December for various smuggling trips.

As a result of Spitler's November meetings, a trip was planned for December 9, 1976. Spitler and Jones flew to Oaxaca in separate planes. Spitler's aircraft had been obtained by Wood and Malone; Jones flew N344V. In Mexico, both planes were loaded with marijuana and prepared for the return trip to the Cotulla-Freer area. On the morning of December 9, Henshaw was observed in Dallas moving airplane seats from one automobile to another and was joined shortly thereafter by Belmares and Oscar Garcia de Anda. Later that morning Henshaw drove to 3710 Cedar Springs and was observed attaching a radio antenna to a van truck. That evening, on Farm Road 624 in the Cotulla-Freer vicinity, the truck was observed meeting a motor home and an automobile. Two of the vehicles were placed some distance apart facing another on the road. As the aircraft flew overhead without lights, the headlights of the two vehicles were turned on for a short period of time, illuminating the makeshift landing strip.

The pilots of the aircraft overhead were Spitler and Jones, who had kept each other in sight and had maintained

radio contact on the flight from Mexico. Spitler landed on the farm road first, and Wood and others unloaded the aircraft. Spitler and Wood then flew to San Antonio, where they were arrested by Customs pilots and the plane seized. Near the landing site, Bennet was arrested in his automobile and Hines was arrested in the motor home, which was loaded with marijuana. Two other men fled, abandoning the marijuana-loaded van truck. Jones' plane, N344V, crashed in Beeville, Texas, but Jones salvaged 200 pounds of marijuana. This contraband was driven to Austin around December 11, 1976. Following the ill-fated December 1976 trip, the group was effectively broken up, and arrests, trials and convictions followed.

Conspiracy to Import Marijuana

All appellants except Jones attack the sufficiency of the evidence to sustain their convictions on count 1, the conspiracy count. Appellants Belmares and Henshaw attack the proof of a single conspiracy and argue that all that was shown was a series of unrelated flights. Appellants Michel, Henshaw, and Hines contend that the evidence is not sufficient to link them to a conspiracy to import marijuana.

[1-7] In reviewing the sufficiency of the evidence to sustain appellants' convictions, we must view the evidence in the light most favorable to the government, *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942), and reverse only if reasonable jurors could not find the evidence inconsistent with every hypothesis of the accuseds' innocence. *United States v. Ragano*, 520 F.2d 1191, 1203 n. 16 (5th Cir. 1975), *cert. denied*, 427 U.S. 905, 96 S.Ct. 3192, 49

L.Ed.2d 1199 (1976). The government must prove, either by direct or circumstantial evidence, an agreement or common purpose to violate the law. *United States v. Warner*, 441 F.2d 821, 830 (5th Cir.), *cert. denied*, 404 U.S. 829, 92 S.Ct. 65, 30 L.Ed.2d 58 (1971). The proof, whether direct or circumstantial, must establish beyond a reasonable doubt that a conspiracy existed between knowing partners. *United States v. Duckett*, 550 F.2d 1027, 1030 (5th Cir. 1977). For a conspiracy under 21 U.S.C. § 963, there is no need to allege or to prove overt acts. *United States v. Thomas*, 567 F.2d 638, 641 (5th Cir. 1978). That the single conspiracy charged in the case at bar existed is clear. The government presented overwhelming proof of the illegal agreement or common purpose: Belmares and the other agreed to fly marijuana from Mexico into Texas; protected landing strips in both countries were located and secured; pilots and ground crews were recruited; a source for high-grade Mexican marijuana was recruited and engaged; marijuana was purchased in Mexico and flown into Texas to be picked up and distributed by members of the group. The division of labor under Belmares' direction and the continuing nature of the operation are further indicia of the underlying agreement. *United States v. Becker*, 569 F.2d 951, 959 (5th Cir.), *cert. denied*, ___ U.S. ___, 99 S.Ct. 188, 58 L.Ed.2d 174 (1978). Whether a scheme is one conspiracy or several is primarily a question for the jury, *United States v. Rodriguez*, 509 F.2d 1342, 1348 (5th Cir. 1975), and we believe their conclusion here is supported by substantial evidence. That each flight was a random, separate venture discrete from the others defies belief. The group's efforts to maintain protected landing sites and the continuous planning and cooperation between the persons involved convinces us that this was one scheme to import marijuana which envisioned as many flights as could safely

be made. The plan necessarily required the assistance of many persons performing varied functions; yet there was still only one overall agreement between the parties to perform functions necessary to and in furtherance of the illegal common purpose. This makes out one conspiracy. *United States v. Becker, supra; United States v. Perez*, 489 F.2d 51, 62 (5th Cir. 1973), *cert. denied*, 417 U.S. 945, 94 S.Ct. 3067, 41 L.Ed.2d 664 (1974). The plan does not become several plans simply because some members were cast in more vital roles than others or because certain members performed only a single function. *United States v. Becker, supra.* Neither does it become several plans because of internal personnel changes. *United States v. Scott*, 555 F.2d 522 (5th Cir.), *cert. denied*, 434 U.S. 985, 98 S.Ct. 610, 54 L.Ed.2d 478 (1977). The government's substantial proof of overlapping membership and activities directed toward a common goal is sufficient to support the jury verdict reflecting a single conspiracy. *United States v. Scott, supra; United States v. Perez, supra; United States v. Morado*, 454 F.2d 167 (5th Cir.), *cert. denied*, 406 U.S. 917, 92 S.Ct. 1767, 32 L.Ed.2d 116 (1972).

[8-10] To establish that each individual defendant was a culpable member of the conspiracy, the government must prove that the defendant knew of the agreement and, with that knowledge, voluntarily participated in it. *United States v. White*, 569 F.2d 263, 267 (5th Cir. 1978); *United States v. Caro*, 569 F.2d 411, 416 (5th Cir. 1978). The evidence must be sufficient to show that each defendant had a general knowledge of the overall purpose and scope of the conspiracy, but it is not necessary that the conspirators know each other or the details of each enterprise making up the conspiracy. *United States v. Becker, supra.* Once we have determined that the conspiracy existed and that each defendant committed acts that furthered its unlawful purpose, we

must satisfy ourselves that each defendant possessed the requisite knowledge of the general purpose of the agreement. *United States v. Brasseaux*, 509 F.2d 157, 160 & n. 3 (5th Cir. 1975). It is in our review of the sufficiency of the evidence of the element of *knowing* participation that this circuit's "slight evidence" rule is used.

> Once it has been established that a conspiracy exists and that a particular defendant was clearly connected to the conspiring group or acted in a manner which unmistakably forwarded the conspiracy, then only slight additional evidence suffices to permit an appellate court to find that the jury could reasonably infer that one shown beyond a reasonable doubt to be a participant was in fact a knowing participant.

United States v. Becker, 569 F.2d at 961. *See also United States v. Duckett, supra; United States v. Alvarez*, 548 F.2d 542, 544 (5th Cir. 1977).

[11] Government witnesses, who were themselves participants in the venture, clearly established the existence of an ongoing conspiracy to import marijuana, which employed many persons. Belmares' role in the venture cannot be contested. He was the plan's central figure from its inception until the final flight into South Texas some two years later. Government evidence also showed that Michel provided expense money for one flight into Mexico and arranged for a second flight to be met at the Addison, Texas, airport. Government witnesses testified that Henshaw boarded a plane in Mexico flown by one of the group's pilots and directed him to a landing field so that a load of marijuana could be picked up and flown back to South Texas. Hines was arrested in a motor home full of marijuana a short distance from the clandestine landing site of the group's final trip. Jones was a pilot for Belmares' operation and flew

several of the marijuana flights himself. All appellants clearly committed acts to further the importation scheme.

Far more than the slight additional evidence necessary was adduced. Belmares' knowledge and intent is beyond argument; indeed, he does not directly challenge this aspect of the jury verdict. Government evidence showed that Michel arranged for an airplane in late 1975 and accompanied the pilot to deliver it to Jones in South Texas so that Jones could pick up a load of marijuana stashed in Mexico. In 1976 Michel telephoned the supposedly-bribed Addison, Texas, police chief to deliver a pre-arranged coded message regarding an incoming flight of marijuana. Henshaw was placed, by a government witness, at a November meeting in Dallas between Belmares, Jones (pilot), Spitler (pilot), and Wood (ground operations) at which the December 1976 importation trip was planned. Earlier Henshaw and Oscar Garcia de Anda, the group's "Mexican connection," met Hulsey at the Oaxaca, Mexico, airport and took him to a downed plane for the purpose of determining whether the plane could be repaired so that a load of marijuana could be flown into the United States.

Hines argues most strenuously that no evidence supports the jury's conclusion that he had knowledge of the group's importation purpose. We disagree. In November 1976, Hines was introduced to government witness Spitler (pilot) by Malone (aircraft procurer) as one who had a motor home and was "thinking about doing some driving for us." Spitler was told by Wood (ground operations) that the motor home would be used to transport marijuana. "Aspects of the marijuana" were discussed in Hines' presence during a 20-minute car ride to Wood's apartment in Oklahoma City. This meeting was held about two weeks before the December 9, 1976, trip of the group – an importation trip in which Wood and Spitler were involved. On the evening of

December 9 the motor home and two other vehicles were rendezvoused in the Cotulla-Freer vicinity and proceeded to FM 624 where two of the vehicles illuminated a makeshift runway by facing each other and briefly turning on their headlights. Later, after a landing had been made at this clandestine border site and the plane had again become airbonre, the automobiles were followed from the scene, and Hines was arrested a short distance away in a motor home crammed with marijuana. Spitler flew one of the planes from Mexico to this landing site, and Wood assisted in loading the marijuana from the plane into the ground vehicles. The evidence against appellant Hines, as well as that against appellants Belmares, Michel, and Henshaw, is sufficient to support their convictions for conspiracy to import marijuana. Jones did not challenge the evidence to support his count 1 conviction.

Importation of Marijuana

Appellants Belmares, Jones and Michel assert that their convictions on count 10 (importation) must be reversed for want of sufficient evidence. Belmares and Jones also attack their convictions on count 13 (importation); the former complains that no evidence was introduced to link him to this trip, and the latter contends that his conviction on this count was obtained by the use of marijuana illegally seized following a detention and search of a U-Haul truck without probable cause.

[12] The government proved count 10 through the testimony of William C. White, an immunized witness who for a time participated in the scheme. He testified that Michel called him from Cleburne, Texas, one evening in late December 1975 or early 1976 and asked him to go to Love Field in Dallas to meet Jones, who was flying a load of marijuana

in from Mexico. Michel was waiting for him at a secret landing strip, but darkness had forced Jones to overfly the runway and to proceed to Love Field. White did as he was asked and later watched as Jones and Michel transferred the marijuana from the airplane into a van. Michel drove away with the marijuana. This flight was the basis for count 10 on which Jones, Michel and Belmares were convicted.

[13, 14] Jones and Michel do not contend that this testimony is insufficient to sustain their convictions. They argue that White's testimony must be disregarded because the jury rejected his testimony concerning two other acts of importation alleged in counts 11 and 12 by returning not guilty verdicts on those two counts. We disagree. The jury did not have to credit White's entire story in order to believe a part of it. *United States v. Edwards,* 488 F.2d 1154, 1158 (5th Cir. 1974). It was within their province to accept as true that the act of importation charged in count 10 occurred as White testified and to reject his story as it related to counts 11 and 12. Where a multi-count verdict appears inconsistent, the appellate inquiry is limited to a determination whether the evidence is legally sufficient to support the counts on which a conviction is returned. What the jury did with the remaining counts is immaterial. *United States v. Fuiman,* 546 F.2d 1155, 1157-58 (5th Cir.), *cert. denied,* 434 U.S. 856, 98 S.Ct. 176, 54 L.Ed.2d 127 (1977). The jury's verdict on count 10 against Jones and Michel is based on ample evidence, and their convications are affirmed.

Jones further argues that his conviction for importation of marijuana on count 13 must be reversed for failure to suppress marijuana seized by Dallas County sheriff's deputies in May of 1976. After Deputy Sheriff Oxford, investigating a call from the Lancaster, Texas, airport, went to the airport to get further information, a radio call was dispatched to stop

a U-Haul bobtail truck observed traveling east away from the airport. The truck was stopped a few minutes later, and Rush was arrested for driving without a license. Deputy Oxford arrived at the scene moments after the stop and, while passing within two feet of the padlocked rear of the truck, detected the odor of marijuana. The truck was driven to the sheriff's office where a search of the truck, after a warrant was obtained, revealed 62 bundles containing approximately 1,000 pounds of marijuana. By motion to suppress, Rush unsuccessfully challenged the stop and search. Jones adopted this motion by filing a general "Motion to Adopt Motions of Co-Defendants" but did not file such a written motion of his own. Jones' attorney did not participate in the suppression hearing except to adopt an objection, made by yet another co-defendant, to the admission of any testimony concerning the arrest of Rush and seizure of the marijuana. Jones now complains that the initial stop of the U-Haul was without probable cause and that the seized evidence was inadmissible as "fruit of the poisonous tree." He further contends that the subsequent search of the truck was also without probable cause. The government argues on appeal that Jones has no "standing" to challenge this search and seizure because he has not asserted that *his own* fourth amendment rights were violated. *See Rakas v. Illinois,* ___ U.S. ___, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978). Although we might agree with the government were this issue properly presented, we note that Jones' standing to raise a fourth amendment claim was not challenged below and the matter was never litigated. We find it unnecessary, however, to remand for a factual determination of Jones' interest in the place searched or property seized. We hold that the initial stop of the U-Haul truck was legal and that the subsequent search was made upon probable cause.

[15-17] We must begin by examining the justification for the stop because, if it was illegal, the subsequent acts

were fruits of the poisonous tree. *Wong Sun v. United States,* 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). We recognize the general rule that a police officer may stop a vehicle and request production of a driver's license on "somehwat less" than probable cause. *Dell v. Louisiana,* 468 F.2d 324, 326 (5th Cir. 1972), *cert. denied,* 411 U.S. 938, 93 S.Ct. 1904, 36 L.Ed.2d 400 (1973); *United States v. Marlow,* 423 F.2d 1064 (5th Cir. 1970); *see* Tex.Rev.Civ.Stat.Ann. art. 6687b, § 13 (1977). Police officers may also stop an individual if the officer has reasonable grounds to suspect that the particular individual is involved in criminal activity. *United States v. McDaniel,* 550 F.2d 214, 217 (5th Cir. 1977); *United States v. McCann,* 465 F.2d 147, 158 (5th Cir. 1972), *cert. denied sub nom. Kelly v. United States,* 412 U.S. 927, 93 S.Ct. 2747, 37 L.Ed.2d 154 (1978). In determining whether reasonable suspicion existed, we must examine the facts known to the officer at the time of the stop. *United States v. Rias,* 524 F.2d 118, 121 (5th Cir. 1975). We can, of course, consider the cumulative knowledge of the officers working on the case, rather than only the knowledge possessed by the officer who made the stop, where there has been some degree of communication between them. *Moreno-Vallejo v. United States,* 414 F.2d 901, 904 (5th Cir. 1969), *cert. denied,* 400 U.S. 841, 91 S.Ct. 82, 27 L.Ed.2d 76 (1970).

[18] The airport manager called Deputy Oxford at his home sometime after midnight and asked him to come to the airport because something was being transferred from an airplane to a truck at the far end of the runway. The two men had been working together for some months to determine whether the small airport was being used after closing hours as a landing strip for smuggling operations. Their investigation began when the manager found what laboratory tests identified as marijuana in a plane based at the airport. The manager had alerted Deputy Oxford to

the possibility of smuggling and began watching the movements of certain private aircraft. After receiving the phone call, the deputy went to the airport and, on the basis of the information he received from the manager, initiated a radio broadcast to stop the U-Haul truck. At the time of the stop, the Dallas County Sheriff's Office had knowledge of the following facts: the Lancaster airport closed at 10:00 p.m. and was seldom used after that hour; the U-Haul truck had been parked beyond the runway with its lights on when the plane began circling the field to land; the truck proceeded through the parking lot with its lights on but drove down the taxiway past the terminal with its lights off; the truck and the plane met at the far end of the runway to begin the transfer of cargo; approximately three people loaded packages into the truck for several minutes; the area where the transfer occurred is not the normal place at this airport, even in daylight hours, for unloading cargo or luggage; similar occurrences at this hour were not common at this airport; the plane took off immediately after the loading ceased; the truck left the airport by driving across open fields away from the terminal rather than by using a paved road which would have taken him past the terminal; the truck was travelling away from the airport in an easterly direction, which was the only direct route to Interstate 635. In addition, Deputy Oxford knew from past experience that small country airports were often used by marijuana smugglers to fly loads in after the airfield is closed and that the Lancaster airfield had likely been used for that purpose in the recent past. These facts, viewed as a whole, amounted to suspicion sufficient to warrant an investigative stop. *See United States v. Worthington*, 544 F.2d 1275 (5th Cir.), *cert. denied*, 434 U.S. 817, 98 S.Ct. 55, 54 L.Ed.2d 72 (1977); *United States v. Maslanka*, 501 F.2d 208 (5th Cir. 1974), *cert. denied, sub nom. Knight v. United States*, 421 U.S. 912, 95 S.Ct. 1567, 43 L.Ed.2d 777 (1975); *United States v. Rollerson*, 491

F.2d 1209 (5th Cir. 1974); *United States v. McCann, supra*. *Compare United States v. Robinson*, 535 F.2d 881 (5th Cir. 1976).

[19-21] Having determined the initial stop to be legal, we turn to the remaining sequence of events. When stopped and asked to produce his driver's license, Rush admitted he did not have it with him. Therefore, his arrest was based on probable cause. *Dell v. Louisiana*, 468 F.2d at 326. Moreover, when Deputy Oxford arrived at the scene shortly thereafter to begin his investigation of the airport incident and smelled the marijuana, probable cause clearly existed for a warrantless search of the truck. *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925); *United States v. Mitchell*, 538 F.2d 1230 (5th Cir. 1976) (en banc), *cert. denied*, 430 U.S. 945, 97 S.Ct. 1578, 51 L.Ed.2d 792 (1977); *United States v. Walker*, 522 F.2d 194 (5th Cir. 1975). The officers, however, obtained a warrant, and we fail to see how the legality of the search can be seriously questioned. No error was committed in overruling the motion to suppress, and Jones' conviction on cout 13 is affirmed.

[22-26] Appellant Belmares' convictions on counts 10 and 13 must also be affirmed. He argues that no evidence connected him directly with these flights, and thus the convictions must be reversed. Again we must disagree. We have held that sufficient evidence existed for the jury reasonably to conclude that Belmares was a knowing participant in a continuing conspiracy to import marijuana from Mexico. Jones did not appeal his conviction for belonging to the same conspiracy, and his convictions for counts 10 and 13, two substantive importation offenses, today have been affirmed. Well settled is the principle that a party to a continuing conspiracy may be responsible for a substantive offense committed by a co-conspirator in furthernace of the conspiracy, even though that party does not participate in the substantive offense or have any knowledge of it. *Pinkerton v. United States*, 328 U.S. 640, 647, 66 S.Ct. 1180, 90

L.Ed. 1489 (1946). Once the conspiracy and a particular defendant's knowing participation in it has been established beyond a reasonable doubt, the defendant is deemed guilty of substantive acts committed in furtherance of the conspiracy by any of his criminal partners. *United States v. Sullivan*, 578 F.2d 121, 122-23 (5th Cir. 1978). This principle has been repeatedly applied by this circuit in cases involving drug conspiracies and substantive drug violations. *E.g., United States v. Sullivan, supra; United States v. Decker*, 543 F.2d 1102, 1103-04 (5th Cir. 1976), *cert. denied sub nom. Vice v. United States*, 431 U.S. 906, 97 S.Ct. 1700, 52 L.Ed.2d 390 (1977); *United States v. Apollo*, 476 F.2d 156, 162 (5th Cir. 1973). It should be no less strictly applied to hold the organizer or supervisor of a criminal enterprise responsible for the acts of his co-conspirators done in furthernace of the operation he manages. The *Pinkerton* vicarious-liability rationale is based upon an agreement or common purpose shared by co-conspirators; they are partners in crime, and the act of one in furtherance of the unlawful plan is the act of all. *Pinkerton v. United States*, 328 U.S. at 646-47, 66 S.Ct. 1180. This element is also present in the offense set out in 21 U.S.C. § 848 – conducting a continuing criminal enterprise – of which Belmares was convicted. The statute requires that a defendant must act "in concert" with five or more persons. The Supreme Court and this court have interpreted this to encompass the agreement required to prove a conspiracy. *Jeffers v. United States*, 432 U.S. 137, 97 S.Ct. 2207, 53 L.Ed.2d 168 (1977); *see United States v. Johnson*, 575 F.2d 1347 (5th Cir. 1978). Therefore, we hold *Pinkerton* and its progeny equally applicable to defendants charged with either conspiracy to violate the drug laws or a section 848 continuing criminal enterprise. The appellate inquiry is whether the government offered sufficient proof that a jury might reasonably conclude

that an agreement or common purpose to violate the Drug Control Act existed. If this concert of action has been proved, all members of the enterprise, including the organizer, manager, or supervisor, are responsible for the substantive offenses committed by each member during the course of and in furtherance of the plan. Appellant Jones' two importation offenses charged in counts 10 and 13,' convictions we today affirm, were unquestionably committed to further the group's illegal scheme. Belmares, as supervisor, shares equal responsibility for those offenses, and we likewise affirm his two convictions for the two acts of importation alleged in counts 10 and 13.[13]

Conducting a Continuing Criminal Enterprise

[27] Appellant Belmares complains that his conviction for conducting a continuing criminal enterprise in violation of 21 U.S.C. § 848 cannot be affirmed because the evidence is insufficient to support a conviction. Central to this argument is his related contention that there is no evidence to convict him of the substantive importation offenses alleged in counts 10 and 13.

[28] A person engages in a continuing criminal enterprise, as defeined in 21 U.S.C. § 848(b)(2), if he violates

[13] We are mindful of the rule that a conviction can not be affirmed on appeal on a theory not presented to the jury. We believe, however, that the charge fairly presented the *Pinkerton* principle to the jury. The trial court instructed the jury on two occasions in its final charge that after they were satisfied beyond a reasonable doubt that a conspiracy exixted and that a defendant was one of the members of it, then that defendant assumed the responsibility for the acts and statements of all other members made in furtherance of the conspiracy.

the Drug Control Act in a continuing series of such violations (a) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and (b) from which such person obtains substantial income or resources. Belmares does not contend the government failed to prove he obtained substantial income from the operation but does, however, attack proof of the other statutory elements. First, he asserts that there is no proof he supervised or acted in concert with five or more persons engaged in a smuggling operation. He characterizes himself as no more than an equal participant in isolated smuggling ventures and suggests that he was convicted solely because he appeared to be of Mexican descent. This argument is frivolous. No fewer than seven government witnesses testified that all or part of their involvement in smuggling marijuana was under the direction and supervision of Belmares. These witnesses also testified that others, including his co-defendants, were working for him as well. The government clearly proved that Belmares acted in concert with five or more persons[14] and occupied a position of supervisor, manager, or organizer with respect to these persons.

Belmares next contends that the government failed to prove a continuing series of violations of the Drug Control Act. Count 2 of the indictment charged Belmares with a "continuing series of violations consisting of the offenses charged in counts 1, 5, 10, 11, 12, 13, and 16." The trial court charged the jury that a conviction on count 2 was de-

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[14] The requisite five persons need not act in concert at the same time. *United States v. Bolts*, 558 F.2d 316, 320-21 (5th Cir. 1977), *cert. denied*, 434 U.S. 930, 98 S.Ct. 417, 54 L.Ed.2d 290 (1978).

pendent on their finding beyond a reasonable doubt that Belmares committed three or more of the offenses charged in the above counts.[15]

[29] Belmares was convicted on six counts – conspiracy to import marijuana, a continuing criminal enterprise, and four substantive importation offenses. He does not challenge his convictions for two of the substantive offenses (counts 4 and 5). He argues, however, that no evidence supports his convictions for importation alleged in counts 10 and 13 and that they cannot be used as a basis for a § 848 conviction. He further asserts that the conspiracy conviction cannot be used because it is a lesser-included offense to conducting a continuing criminal enterprise. This, his argument continues, the verdict is reduced to valid convictions on only two substantive counts and the conviction for a continuing criminal entrprise must fall. We agree, as we must, that conspiracy to import marijuana is a lesser-included offense to

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[15] We note that few cases have considered the exact meaning of the term "continuing series of violations." Those that have done so require three or more violations, but less clear is what constitutes a "violation" for purposes of § 848. Appellant Belmares argues that three *convictions* are required, but some courts have apparently allowed proof of an overt act in violation of the drug laws to suffice, even though it was not the basis for a separate substantive count. *See United States v. Johnson, supra; United States v. Fry*, 413 F.Supp. 1269 (E.D.Mich.1976), *aff'd*, 559 F.2d 1221 (6th Cir. 1977); *United States v. Bergdoll*, 412 F.Supp. 1308 (D.Del.1976); *United States v. Collier*, 358 F.Supp. 1351 (E.D.Mich.1973), *aff'd*, 493 F.2d 327 (6th Cir.), *cert. denied*, 419 U.S. 831, 95 S.Ct. 56, 42 L.Ed.2d 57 (1974). We need not decide this question, however, because the government has agreed, for purposes of this appeal, that three convictions are required to support Belmares' § 848 conviction.

conducting a continuing criminal enterprise. *Jeffers v. United States, supra; United States v. Johnson, supra.* We express no opinion on whether proof of the conspiracy could be used to support Belmares' section 848 conviction because we have held that he was properly convicted on counts 10 and 13. Thus, a continuing series of violations was proved, and Belmares' count 2 conviction is affirmed.

[30, 31] We must, however, modify the judgment. Because conspiracy to import is a lesser-included offense to conducting a continuing criminal enterprise, it cannot support a separate conviction and sentence.[16] *Jeffers v. United States, supra; Brown v. Ohio,* 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977); *United States v. Buckley,* 586 F.2d 498 (5th Cir. 1978); *United States v. York,* 578 F.2d 1036 (5th Cir. 1978). The proper remedy for convictions on both greater and lesser offenses is to vacate both the conviction and the sentence of the lesser-included offense. *United States v. Buckley, supra; United States v. Newman,* 468 F.2d 791 (5th Cir. 1972), *cert. denied,* 411 U.S. 905, 93 S.Ct. 1527, 36 L.Ed.2d 194 (1973). Therefore, we vacate Belmares' conviction and sentence for conspiracy to import marijuana (count 1), but there is no need to remand for resentencing because it is clear that the conviction for conspiracy did not lead the trial court to impose a harsher sentence on the greater offense than he would have in the absence of the lesser conviction. *United States v. Buckley, supra.*

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[16] Appellant Belmares complains that the trial court erred in failing to instruct the jury that he could not be convicted of both conspiracy and conducting a criminal enterprise. The instruction was requested and was erroneously refused. Belmares apparently did not object to the court's failure to instruct the jury as he requested, but in any event, our disposition of the conviction and sentence makes consideration of this alleged error unnecessary.

Extraneous-Offense Evidence

Each appellant argues that the trial court erred in allowing an immunized witness, Douglas Spitler, to testify concerning marijuana flights he made during the early months of 1976. They contend that these trips were flown as part of a completely separate conspiracy operating in West Texas and New Mexico and that evidence of these extraneous offenses should have been excluded. They point out that these acts were committed by persons who had not yet joined Belmares and contend that no evidence connected these acts of importation to any defendant on trial. Thus, they argue strenuously that each was prejudiced by admission of evidence of the Spitler trips and further assert that they were prejudiced by the spillover effect of the massive amounts of evidence introduced in this complex case involving multiple defendants and multiple counts. The crux of this argument is that the jury was necessarily confused and was unable to keep separate the evidence admissible against individual defendants. Each appellant concludes that reversible error was committed by the trial court's failure to protect them from the spillover effect of the evidence admissible only against other defendants and by his failure to grant their repeated motions for severance.

[32-35] We begin our consideration of this point by recognizing the general rule that persons who are indicted together should be tried together. *United States v. Morrow,* 537 F.2d 120, 136 (5th Cir. 1976), *cert. denied,* 430 U.S. 956, 97 S.Ct. 1602, 51 L.Ed.2d 806 (1977). Appellants were properly joined under Federal Rule of Criminal Procedure 8(b) because they were "alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense

or offenses."[17] Therefore, disposition of the various motions to sever under F.R.Crim.P. 14[18] was within the discretion of the trial court. We will not reverse the trial court's refusal to grant severance unless abuse of discretion is shown, and appellants have the heavy burden to show that prejudice resulted from the joint trial. *United States v. Morrow, supra; United States v. Perez, supra.* We require that the prejudice be of the most compelling sort against which the trial court will be unable to afford protection. *Tillman v. United States*, 406 F.2d 930, 935 (5th Cir.), *vacated on other grounds*, 395 U.S. 830, 89 S.Ct. 2143, 23 L.Ed.2d 742 (1969).

It is appellants' contention that the requisite prejudice resulted from Spitler's testimony concerning flights made for the New Mexico/West Texas conspiracy prior to its association with the Belmares group. The government concedes and the evidence shows that prior to May of 1976 two separate and distinct conspiracies, each involving co-indictees or co-defendants in this case, were importing marijuana into the United States. Belmares, Jones and Michel were in an ongoing operation with a source of

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[17] Appellant Belmares contends that there was also a misjoinder of offenses. This contention is without merit. F.R.Crim.P. 8(b).

[18] The rule provides as follows:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.

high-grade marijuana in Oaxaca, Mexico, with its distribution situs in Dallas. A separate group, headed by Wood and McVey, with whom Spitler worked as a pilot, were importing a lower grade commercial marijuana into West Texas and New Mexico. A May 1976 attempt by Belmares to recruit Spitler for his enterprise failed, but Spitler did agree to introduce Wood to Belmares. The two men met in Belmares' apartment and agreed to join forces for their mutual benefit.

[36, 37] This alliance is best viewed as a merger of two independent smuggling groups with identical illegal purposes. Each group joined the other and formed an expanded enterprise to continue the importation plans of each. Belmares supplied the contact for high-quality marijuana that Wood needed; Wood supplied the capital, aircraft and pilot that Belmares needed. No less than four members of the Wood group, including co-defendant Malone, stayed with the expanded organization until the ill-fated December 9 trip. Hines and Henshaw joined after the two groups merged. When one knowingly joins a conspiracy in progress he is responsible for acts of the conspiracy occurring before or after his association with it. *United States v. Dearden*, 546 F.2d, 622, 625 (5th Cir.), *cert. denied*, 434 U.S. 902, 98 S.Ct. 296, 54 L.Ed 2d 188 (1977); *United States v. Brasseaux, supra; Nelson v. United States*, 415 F.2d 483, 486 (5th Cir. 1969), *cert. denied*, 396 U.S. 1060, 90 S.Ct. 751, 24 L.Ed.2d 754 (1970). It is clear that the Wood group knowingly joined Belmares' marijuana-importation conspiracy. Therefore, the prior acts of the Belmares group in furtherance of their importation scheme were also attributable to Wood and his associates. It is equally clear that Belmares' group knowingly joined Wood's importation conspiracy and in so doing became responsible for the Wood group's prior acts in furtherance of their importation scheme. The expanded conspiracy shared

a marijuana source in Oaxaca, landing strips in South Texas, aircraft, pilots, ground crews, and funds. Because two conspiracies with an identical illicit purpose merged into one in order to more effectively achieve success, evidence of prior acts of each group in furtherance of that purpose was properly admitted against all members of the two groups.

[38] Moreover, the trial court's instructions provide the best safeguard against prejudice resulting from improperly cumulated evidence. *United States v. Morrow, supra.* Where, as here, the government charges several defendants with conspiracy and numerous substantive counts, the possibility always exists that the jury might cumulate the evidence introduced against all to find guilty a defendant whose connection was only marginal. We are convinced, however, that the instructions given by the trial judge in this case were adequate to minimize the possibility of cumulation of the government's evidence. He charged the jury twice before trial and again in detail in his final instructions to give "separate and personal consideration to the case against each individual defendant." This general admonition was repeated more specifically in the court's charge regarding responsibility for acts and statements of co-conspirators. In addition, he gave clear and thorough instructions concerning the government's burden of proof and the elements required for a conviction on each count. Appellants must show more than that they may have had a better chance at acquittal had they been tried separately or that more evidence was introduced against certain of them than others. No abuse of discretion was committed by the trial court in denying appellants' motions for severance. *United States v. McLaurin,* 557 F.2d 1064 (5th Cir. 1977), *cert. denied sub nom. Bryant v. United States,* 434 U.S. 1020, 98 S.Ct. 743, 54 L.Ed.2d 767 (1978); *United States v. Morrow, supra; United States v. Crockett,* 514 F.2d 64 (5th Cir. 1975); *United States v. Perez, supra.*

Conclusion

[39, 40] We have carefully examined appellants' remaining contentions and, finding no reversible error, we reject them.[19] Accordingly,

(1) The conspiracy convictions (count 1) of appellants Jones, Michel, Henshaw and Hines are AFFIRMED.

(2) The conspiracy conviction (count 1) and sentence of appellant Belmares is VACATED.

(3) The conviction of appellant Belmares for conducting a continuing criminal enterprise (count 2) is AFFIRMED.

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[19] Among the remaining contentions are two about which we will comment briefly. Jones and Michel call our attention to an earlier prosecution by the State of Texas for acts what were part of transactions for which they were convicted below. They assert that this subsequent prosecution by the federal government following the state prosecution is in violation of the *Petite* policy of the Justice Department. They would have us reverse their federal convictions because of this violation. We need say only that the *Petite* policy, an internal policy of the Justice Department, is not to be enforced against the government. *United States v. Nelligan,* 573 F.2d 251, 255 (5th Cir. 1978).

Appellant Hines argues that the trial judge abused his discretion in imposing sentence upon him. He received a sentence of two years imprisonment with a special parole term of three years following his conviction on the conspiracy count. Hines claims he was penalized for electing to go to trial on the charges and complains of the severity of his sentence when compared to that given co-defendant Lallier, who pleaded guilty and was assessed three years probation in lieu of imposition of sentence. The trial judge committed no "arbitrary or capricious action amounting to a gross abuse of discretion" in sentencing Hines, and we decline to modify his sentence. *E.g., United States v. De La Fuente,* 550 F.2d 309 (5th Cir. 1977).

(4) The convictions of appellants Belmares, Jones and Michel for importation of marijuana (count 10) is AFFIRMED.

(5) The conviction of appellants Belmares and Jones for importation of marijuana (count 13) is AFFIRMED.

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-5518

J.S. Court of Appeals
FILED
MAR 2 1979
Edward W. Wadsworth
Clerk

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

LEWIS DAVIS MICHEL, ROBERT JOSEPH BELMARES, JOHN HANDY JONES, DANIEL STEWART HENSHAW and TED RAY HINES,
Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Texas

ON PETITIONS FOR REHEARING
(March 2, 1979)

Before GEWIN, RONEY and GEE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed on behalf of appellants Belmares, Henshaw and Michel in the above entitled and numbered cause be and the same are hereby DENIED.

ENTERED FOR THE COURT:

/s/ THOMAS GIBBS GEE
United States District Judge

Supreme Court, U. S.
FILED
JUL 6 1979
MICHAEL RODAK, JR., CLERK

No. 78-1498

In the Supreme Court of the United States

OCTOBER TERM, 1978

LEWIS DAVIS MICHEL AND
JOHN HANDY JONES, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1498

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 588 F. 2d 986.

JURISDICTION

The judgment of the court of appeals was entered on February 1, 1979. Petitions for rehearing were denied on March 2, 1979 (Pet. App. 33a). The petition for a writ of certiorari was filed on March 30, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners were prejudiced by evidence admitted against a co-defendant.

2. Whether the prosecution of petitioners violated the Department of Justice policy respecting dual prosecution.

3. Whether the Double Jeopardy Clause precluded prosecution of petitioners in federal court following their conviction in state court on related offenses.

4. Whether petitioner Jones' conviction on count 13 of the indictment was obtained through evidence seized following an assertedly illegal detention of a U-Haul truck.

5. Whether petitioners were prejudiced by an allegedly improper remark made by the prosecutor in closing argument.

STATEMENT

1. Following a jury trial in the United States District Court for the Northern District of Texas, petitioners were convicted of various offenses charged in a 17-count indictment and involving the importation of marijuana into the United States, in violation of 21 U.S.C. 952(a), 960, and 963 (Pet. App. 2a-3a).[1] Petitioner Michel was convicted on counts 1 (conspiracy) and 10 (importation), and sentenced to concurrent terms of five years' imprisonment, to be followed by a three-year special parole term (S. Tr. 27).[2] Petitioner Jones was convicted

[1]The first count of the indictment charged a conspiracy among 19 named defendants and others to acquire marijuana in Mexico and transport it to Dallas, Texas, and other areas of the United States, in violation of 21 U.S.C. 963. Counts 10, 11, and 12 charged petitioners and others with importation offenses in violation of 21 U.S.C. 952(a) and 960 and 18 U.S.C. 2. Count 13 charged an importation offense against Jones and another defendant. In count 14, Jones and another defendant were charged with an additional act of importation (Pet. App. 2a-3a).

[2]"S. Tr." refers to the transcript of the sentencing proceeding.

on count 1 (conspiracy), and counts 10, 13, and 14 (importation). His five-year concurrent sentences on counts 10 and 13 were made consecutive to the concurrent five-year terms imposed on counts 1 and 14. He was also sentenced to serve three years of special parole (S. Tr. 15, 17-18).

2. The evidence at trial established the existence of a loosely organized enterprise, operating over a period of approximately two years, which imported large quantities of marijuana from Mexico into the United States. The government proved its case primarily through the testimony of witnesses who actually participated in the purchase, importation, and transportation of the marijuana (Pet. App. 4a-5a).

The central figure of the group was Robert Belmares. Before 1975, Belmares and others had begun an operation in which marijuana was smuggled from Mexico by backpack and was transported to a destination within the United States. Belmares hoped to expand the operation and increase the profits by importing the marijuana from Mexico by airplane (Tr. 949-951).

By January 1976, additional people were involved in Belmares' venture. Petitioner Jones, a pilot, referred to Belmares as his "partner," and petitioner Michel served as a go-between for Jones and Belmares and met the flights when they landed in the United States (Tr. 501, 643-644, 2018). Belmares frequently visited Jones' office to inform him that a load of marijuana was ready to be picked up in Mexico (Tr. 638-639). On one occasion in early 1976, Michel and government witness William C. White were in Jones' office when Jones received a call from Mexico concerning the transportation of marijuana (Tr. 640). On another evening, Michel called White and asked for a meeting at an airstrip in Dallas. Michel explained that he

had planned to meet Jones at a clandestine site near Cleburne, but that Jones had passed over the site and was low on fuel. White proceeded to Love Field and met Jones; he watched as Jones and Michel loaded the marijuana into a van and drove it away (Tr. 731-735).

In order to secure a "protected" landing site in the United States, Jones offered a bribe to the chief of police of Addison, Texas, who pretended to accept the offer. In return for the money, Jones expected both non-interference with landings at the Addison airport and early warning of impending law enforcement actions (Tr. 2649). The Addison airport was used in May and June 1976 for several trips in which Jones and Michel were actively involved (Tr. 2525-2541, 2651-2684, 2872). In fact, the Addison police chief was cooperating with other law enforcement agents, and Michel, Jones, and others were arrested at the Addison airport in late June (Tr. 2677-2684).

While jailed after his arrest in Addison, Jones became acquainted with Dueal Ray Hulsey, who pretended to be a pilot. They discussed marijuana smuggling at that time, and in late October 1976, Hulsey met with Jones and Belmares. Belmares asked Hulsey to go to Mexico and to a location in Texas to look at damaged planes and determine whether they could be safely flown, and to consider flying marijuana from Mexico. Hulsey testified that Jones was Belmares' "subcontractor" of pilots (Tr. 1783-1802) and that Belmares was in charge of the details and scheduling of the trips (Tr. 1807-1808, 1830, 1831).

During November and December 1976, Jones and another pilot made several flights, until December 9, 1976, when the other pilot was arrested and Jones' plane crashed in Beerville, Texas (Tr. 1424-1441, 1709-1711, 2322-2332, 2851).

ARGUMENT

1. Petitioners contend (Pet. 7-10) that they were prejudiced by the testimony of Douglas Spitler concerning prior acts of importation. Spitler testified that he, co-defendant Jim Wood, and one McVey had imported marijuana on several occasions between January and April 1976 (Tr. 1366-1389). It was not until late spring of 1976 that Spitler and Wood joined forces with the Belmares-Michel-Jones conspiracy (Tr. 2025-2030). The thrust of petitioners' contention is that the admission of the evidence caused a spillover effect, i.e., that the jury may have cumulated the evidence and improperly considered it against petitioners, although it referred to events that occurred before the conspiracy of which they were a part (Pet. 4-5).

Accepting for purposes of argument that petitioners did not assume liability for prior activities of the Spitler group when they knowingly merged with it (but see *Blumenthal* v. *United States*, 332 U.S. 539, 559 (1947)), their claim is nonetheless insubstantial. As the court of appeals stated (Pet. App. 30a): [T]he instructions given by the trial judge * * * were adequate to minimize the possibility of cumulation of the government's evidence." The judge charged the jury on three separate occasions (Tr. 8, 29, 3586-3587) to give "separate and personal consideration to the case of each individual defendant," and thoroughly instructed the jury concerning the government's burden of proof. The fact that the jury returned 37 separate verdicts, of which 20 were convictions and 17 were acquittals, supports the inference that the jury considered the evidence as to the defendants and the counts individually. In any event, the evidence of petitioners' involvement in the conspiracy and the importations for which they were convicted was so

substantial that the admission of Spitler's testimony, even if error, could not have affected the verdict against them.

2. Petitioners also assert (Pet. 12-14) that the Department of Justice violated its policy against dual state-federal prosecutions (hereafter the "*Petite* policy") by prosecuting them after their trials in state court on related charges. In particular, they assert that their federal prosecution was improper because it had not been authorized at the time they were brought to trial.

a. Prior to their indictment in this case, both petitioners pleaded guilty in state court to a charge of possessing marijuana on June 20, 1976. The subsequent federal indictment charged both petitioners with conspiring to import marijuana over a two-year period that encompassed June 20, 1976, and also charged Jones with importation of marijuana on June 20, 1976.[3]

Prior to the filing of the government's brief in the court of appeals, the Acting Assistant Attorney General authorized Jones' prosecution nunc pro tunc. After Michel filed his petition for a writ of certiorari, the Attorney General approved his prosecution on a nunc pro tunc basis (June 17, 1979).

b. Since the *Petite* policy is an exercise by the Department of Justice of prosecutorial discretion, we submit that the Department's pursuit of a particular prosecution is not subject to judicial review except in unusual circumstances not present here. See *Bordenkircher* v. *Hayes*, 434 U.S. 357 (1978); *United*

[3]Although the possession of marijuana on June 20, 1976, was but one small part of the conspiracy later charged, we assume the two offenses to have arisen out of "a single transaction" for purposes of the *Petite* policy. See *Petite* v. *United States*, 361 U.S. 529, 530 (1960).

States v. *Nixon*, 418 U.S. 683, 693 (1974); *United States* v. *Fritz*, 580 F. 2d 370, 374-375 (10th Cir. 1978) (en banc).[4] Moreover, the authorization to prosecute this case, while not sought at the preferred preindictment stage, was nonetheless consistent with the *Petite* policy as heretofore followed by the Department, and the authorization decision served the interests the policy was created to protect.

In cases in which a prosecution has been initiated without prior approval under the *Petite* policy, and it is subsequently determined that the prosecution was not justified by compelling reasons, the Department has in the past sought dismissal of the indictment even after a conviction has been obtained and affirmed on appeal; it expects to adhere to this policy. See, e.g., *Rinaldi* v. *United States*, 434 U.S. 22 (1977); *Hammons* v. *United States*, vacated and remanded, No. 77-6536 (Oct. 2, 1978); *Frakes* v. *United States*, vacated and remanded, 435 U.S. 911 (1978). However, when it has been determined that a prosecution initiated without prior authorization is nonetheless justified by compelling reasons, it has been the practice of the Department to authorize the prosecution nunc pro tunc. See *Welch* v. *United States*, cert. denied, No. 77-6684 (Oct. 2, 1978); *United States* v. *Malizia*, cert. denied, 435 U.S. 969 (1978).

This procedure does not contravene the *Petite* policy or prejudice the defendant. Nunc pro tunc authorizations are governed by the same standards and are processed in the same manner as timely authorizations. Thus where, as here, the prosecution is authorized nunc pro tunc, the

[4]Limited judicial review may be available on a claim of discriminatory enforcement (see *Bordenkircher* v. *Hayes*, *supra*, 434 U.S. at 364), but no such claim is or could be raised here.

defendant stands in the same position as if a timely authorization had been sought, and he has no ground for complaint.

3. There is no merit in petitioners' contention (Pet. 10-13) that their prosecution in federal court following conviction in state court on related offenses was precluded by the Double Jeopardy Clause. This Court has held that in order for the Double Jeopardy Clause to apply, the second prosecution must be by the same sovereign, for the same offense. *Abbate* v. *United States*, 359 U.S. 187 (1959); *Bartkus* v. *Illinois*, 359 U.S. 121 (1959). See also *United States* v. *Wheeler*, 435 U.S. 313 (1978); *Rinaldi* v. *United States*, *supra*. Accordingly, petitioners' conviction in Texas state court on a charge of possession of marijuana followed by their prosecution in federal court on related charges did not violate the Double Jeopardy Clause.[5]

4. Petitioner Jones argues (Pet. 14-16) that his conviction on count 13 of the indictment should be reversed because it was based on evidence derived from an allegedly illegal search of a truck by the Dallas County Sheriff's Department. Jones does not challenge the search itself, which was authorized by a warrant; his claim is rather that the facts supporting the warrant were discovered through an illegal detention of the truck.

Because the sentence Jones received on count 13 was equal to and concurrent with the sentence imposed under count 10, there is no need to review this claim. Moreover, because Jones does not assert any proprietary or

[5]*Ashe* v. *Swenson*, 397 U.S. 436 (1970), on which petitioners rely, is not to the contrary. *Ashe*, which prohibits a state from relitigating an issue of fact that was determined in a prior prosecution, does not alter the dual sovereignty concept, nor would it apply when the original proceeding resulted in a conviction.

possessory interest in the truck searched, he is not entitled to challenge the search. *Rakas* v. *Illinois*, No. 77-5781 (Dec. 5, 1978). In any event, as the court below held, in a thorough analysis on which we rely (Pet. App. 17a-21a), the initial stop of the vehicle was legal and the subsequent search accordingly untainted.

At approximately midnight on May 21, 1976, the manager of the Lancaster, Texas, airport telephoned Dallas County Deputy Sheriff Oxford and reported that cargo was being transferred from an airplane to a U-Haul truck at the far end of a runway. Oxford, who had been investigating activities at the airport for several months to determine whether it was being used as a loading strip for smuggling operations, went to the airport and learned that the U-Haul had left the airport travelling toward Interstate 635. He then initiated a radio broadcast to stop the truck. As the court of appeals noted (Pet. App. 20a), at the time the directive to stop the truck was issued, Deputy Oxford had knowledge of the following facts: (1) two hours after the airport closed, the U-Haul had been parked beyond the runway with its lights on, but the driver had turned the lights off while driving past the airport terminal; (2) three people transferred cargo from the plane to the truck in an area of the airport not normally used for cargo transfer; and (3) the truck travelled from the airport toward an interstate highway by driving through open fields rather than past the terminal on the paved road (Tr. 134-160, 162-185, 201-230). The foregoing facts supported Deputy Oxford's reasonable suspicion that the U-Haul was being used in criminal activities, and clearly warranted the intermediate response of an investigative stop of the vehicle. See *Terry* v. *Ohio*, 392 U.S. 1 (1968); *Adams* v. *Williams*, 407 U.S. 143 (1972). The fact that the truck was stopped only six miles from the airport, and 15 minutes after the radio broadcast was made (Tr. 145-157), further supports the

reasonableness of the officer's action. See *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 884 (1975); *United States* v. *Hall*, 557 F. 2d 1114, 1117 (5th Cir. 1977), cert. denied, 434 U.S. 907.

5. Petitioners contend (Pet. 17-19) that they were prejudiced by a remark made in the prosecutor's closing argument, which, they claim, improperly referred to facts not in evidence.

Several government witnesses, including William White, testified that as part of their participation in the importation conspiracy, they had occasion to travel on commercial airline flights, purchase fuel, and stay at various motels (Tr. 403, 819, 855-856, 903, 2010, 2526-2528). The government presented documentary evidence corroborating some of this testimony (Tr. 2830-2834, Govt. Exhs. 6-9), and in closing argument, the prosecutor referred to some of the evidence (Tr. 3370, 3377). Thereafter, counsel for petitioner Michel argued that the government had failed to produce receipts or a manifest from Southwest Airlines to substantiate White's testimony about his travels in behalf of the conspiracy (Tr. 3428-3429). Specifically, defense counsel stated that Southwest "is a public conveyance and they have to have a roster list. That wasn't introduced." Counsel for Jones made a similar argument with respect to the testimony of government witness Maggio. He told the jury (Tr. 3517):

> Well, they could get some corroboration from Maggio I think if they went to Austin. It wouldn't be material corroboration. He said he rented a car down there. Where is the rental receipt. Those are still around. He says he flew down there. Where is the airplane tickets. Those are still around.

In rebuttal, the prosecutor stated that the airplane tickets were not available because the airline company destroys tickets after six months (Tr. 3532; see also Tr. 3549). Counsel for Michel joined an objection to the prosecutor's argument; the attorney for Jones expressly waived objection. The court overruled the objection, commenting that the remark was invited and that "I don't think it amounts to too much, anyway" (Tr. 3533).[6]

In these circumstances, Jones has no basis for objecting now to the prosecutor's, comment, having made no objection to it at trial. Nor is there any merit to Michel's contention. Although the remark referred to facts not in evidence, it was a response directly provoked by defense counsel's misleading suggestion, also not based on record evidence, that the tickets "are still around" and that they were not produced because the trips were never taken. This kind of response to the argument of defense counsel is not reversible error. See *United States* v. *Warren*, 550 F. 2d 219, 227 (5th Cir. 1977), cert. denied, 434 U.S. 1016 (1978). See also *United States* v. *White*, 377 F. 2d 908, 910-911 (4th Cir.), cert. denied, 389 U.S. 884 (1967); *United States* v. *Bastone*, 526 F. 2d 971, 988-989 (7th Cir. 1975), cert. denied, 425 U.S. 973 (1976); *United States* v. *Crouch*, 528 F. 2d 625, 633 (7th Cir.), cert. denied, 429 U.S. 900 (1976); *United States* v. *Ivey*, 550 F. 2d 243 (5th Cir.), cert. denied, 431 U.S. 943 (1977).

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[6]When the objection was renewed later, counsel for Jones again waived objection, stating that the error, if any, was "totally harmless," an assessment with which the court agreed (Tr. 3562).

In any event, the prosecutor's remark was "but one moment in an extended trial," *Donnelly* v. *DeChristoforo*, 416 U.S. 637, 645 (1974), and, in the context in which it was made, did not materially prejudice the defense.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[7]The cases cited by petitioners (Pet. 18-19) are not to the contrary. In those cases, the remarks prompting reversal were unprovoked, were directed to the heart of the defense, were part of a pervasive pattern of gross government misconduct, or were so prejudicial in light of the weakness of the government's evidence that the conviction could not fairly stand.

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